Supreme Court, U.S.
FILED

No. 091167 MAR 24 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CLIFTON CLARK,

Petitioner,

v.

CHRISTOPHER B. EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; JIM HOOD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL ADELMAN, ESQUIRE
MS Bar No. 1153
ADELMAN & STEEN, L.L.P.
Post Office Box 368
Hattiesburg, MS 39403-0368
601/544-8291; 601/544-1421 (FAX)
Adelst33@aol.com

Counsel for Petitioner, Clifton Clark

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

During his cross-examination of Petitioner, the Prosecutor commented upon and challenged Petitioner's post-*Miranda* silence. The Fifth Circuit justified this intrusion as an "inquiry into the possibility" of a prior inconsistent statement and not a "manifest intent" to comment on Petitioner's silence. This type of inquiry is prohibited under *Doyle v. Ohio*, 426 U.S. 610 (1976) and is not within the exception found at 426 U.S. 619 fn. 11. The Fifth Circuit "manifest intent" test is not sufficiently tailored as to meet the requirements of *Doyle*.

1.

Whether the Fifth Circuit's analysis of the Prosecutor's comments regarding Petitioner's post-*Miranda* silence is consistent with *Doyle v. Ohio*. Fairly included is the following question: Whether the Fifth Circuit's "manifest intent" test is sufficiently tailored to meet the requirements of *Doyle*.

2.

Whether the Prosecutor's extensive use of Co-Defendant, Michael Barnes' admittedly inadmissible statement during closing argument prohibits a finding of admissibility under *Brecht*.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiff-Appellant and Petitioner: Clifton Clark.

Defendant-Appellees and Respondents: Christopher Epps, Mississippi Department of Corrections; Jim Hood, in his official capacity as Attorney General of the State of Mississippi.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(b) STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTION PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	8
A. CERTIORARI SHOULD BE GRANTED AS TO WHETHER THE FIFTH CIRCUIT'S ANALYSIS OF THE PROSECUTOR'S COMMENTS REGARDING CLARK'S POST-*MIRANDA* SILENCE IS CONSISTENT WITH *DOYLE V. OHIO*	8
B. CERTIORARI SHOULD BE GRANTED AS TO WHETHER THE PROSECUTOR'S EXTENSIVE USE OF MICHAEL BARNES' ADMITTEDLY INADMISSIBLE STATEMENT PROHIBITS A FINDING OF ADMISSIBILITY UNDER *BRECHT*	12
CONCLUSION	18

TABLE OF CONTENTS – Continued

Page

APPENDIX

1. Opinion, In the United States Court of Appeals for the Fifth Circuit.....App. 1

2. Judgment, In the United States District Court for the Southern District of Mississippi, Hattiesburg Division.....App. 15

3. Order, In the United States District Court for the Southern District of Mississippi, Hattiesburg Division, Accepting Magistrate Judge's Recommendation and Dismissing Case with Prejudice.....App. 17

4. Report and Recommendation, In the United States District Court for the Southern District of Mississippi, Hattiesburg Division.....App. 29

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed. 2d 103 (1991) 15, 16

Brecht v. Abrahamson, 507 U.S. 619 (1993) 12, 16, 18

Bruton v. U.S., 391 U.S. 123 (1968) 13, 18

Chapman v. California, 386 U.S. 18 (1967) 18

Clark v. Mississippi, 891 So. 2d 136 (Miss. 2004) 6

Clark v. Mississippi, 125 S.Ct. 1999, 161 L.Ed. 2d 869, 2005 U.S. Lexis 3864 (2005) 7

Crawford v. Washington, 541 U.S. 36 (2004) 7, 13, 16, 17, 18

Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed. 2d 162 (1987) 15, 16, 17

Doyle v. Ohio, 426 U.S. 610 (1976) ..... *passim*

Kotteakos v. United States, 328 U.S. 750 (1946) 16

Nixon v. Epps, 405 F.3d 318 (5th Cir. 2005), *cert. denied*, 546 U.S. 1016 (2005) 16

O'Neal v. McAninch, 513 U.S. 432 (1995) 16

United States v. Robinson, 485 U.S. 25 (1988) 10

United States v. Shaw, 701 F.2d 367 (5th Cir. 1983) 10, 11

Williams v. Taylor, 529 U.S. 362 (2000) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2102(c) 1

28 U.S.C. § 2254 7

RULES

Supreme Court Rules 13.1 & 13.3 1

PETITION FOR WRIT OF CERTIORARI

Clifton Clark, Plaintiff below and Petitioner, respectfully petitions for writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Fifth Circuit, dated December 31, 2009, and which is not a published opinion.

The Order Accepting Magistrate Judge's Recommendation and Dismissing Case with Prejudice, etc. and Judgment of the U.S. District Court for the Southern District of Mississippi, both dated March 31, 2009.

The Report and Recommendation of the U.S. Magistrate Judge dated February 6, 2009.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on December 31, 2009. The petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the decision and judgment of the Court of Appeals. This Court has jurisdiction to review the judgment of the

U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION PROVISIONS INVOLVED

I. Amendment V of the U.S. Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor should any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

II. Amendment VI of the U.S. Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the assistance of counsel to his defense."

III. Amendment XIV Section 1 of the U.S. Constitution provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE

On September 7, 2002, an armed robbery was committed at an Amoco Food Store in Hattiesburg, Mississippi. The faces of both men were concealed. Despite the fact that there was video surveillance at the store, neither of the two (2) clerks who testified at trial, Pam Thornton and Theresa Robins, could make a direct identification of either Defendant. Dwayne Creighton, a customer that night, also testified that he had no way of identifying the robbers. Clifton Clark testified and specifically denied that he had robbed the Amoco store.

The State also called Michael Barnes, Appellant's Co-Defendant, as a witness. Mr. Barnes initially

testified that Petitioner, Mr. Clark, was not with him on the night in question and that the only reason that he implicated Clark in his prior written statement was because he was under the impression that Clark had accused Mr. Barnes, so he was trying to "shoot back at him."

At this point, Mr. Barnes refused to testify further concerning the robbery, even after ordered by the trial judge to do so. The State then called as a witness, Detective Rusty Keys, from the Hattiesburg Police Department to read into evidence the statement Mr. Barnes had given regarding his activities on the night of the robbery. The statement strongly implicated Petitioner as the gunman during the robbery, and was signed by Mr. Barnes as well as the detective. The statement was admitted over defense counsel's objection.

Despite the fact that Barnes refused to testify, even after the trial judge ordered him to do so, in the end the Court took no punitive measures against Mr. Barnes and made no attempt to set aside his earlier plea to simple robbery or his relatively lenient five (5) year sentence.

During the cross-examination of Mr. Clark by Assistant District Attorney, Gray Burdick, through his questioning, commented on Mr. Clark's pre-*Miranda* silence as follows:

> "Q. (Mr. Burdick): Ok. Well, you invoked your *Miranda* rights and the Fifth Amendment of the United States Constitution

and refused to talk, which is your right, and I respect that. But when was the first time you told someone – when was the first time you told your attorney that you were asleep?

A. I can't recall exactly. I talked to my attorney off and on since this – since I've had this charge.

Q. Did you tell your attorney that you were asleep that night prior to yesterday?

A. Yes, sir."

The only incriminating evidence, other than the statement of Mr. Barnes, was the testimony of Mandy Weathers and LaTosha Fairley, who both testified that the Petitioner and Mr. Barnes admitted to them that they had robbed the Amoco store. However, Ms. Fairley submitted an Affidavit in which she questioned her own testimony. In her Affidavit, Ms. Fairley stated as follows:

. . .

"2. On Wednesday, the 17th day of July, 2002, I testified in the above-styled case as a witness for the state against Clifton Clark. A portion of my testimony was that Clifton Clark had acknowledged to me that he had been involved in the armed robbery for which he was being tried. I testified that I talked with him over the phone and that he said he did it.

3. Since I gave that testimony, I have searched my mind, memory and my heart and

> I realize that I cannot say that for certain. I know that I wanted to ask him that question and I know that he and I talked about the incident, but I am trying to be as honest as I can, I cannot remember him ever saying he did it. I know that I was under so much pressure from the police and heard from so many other people that pointed the finger at Cliff, that I am afraid that my mind and memory have been influenced by that rather than what I know from my own knowledge."

Although Ms. Fairley met with trial counsel before the defense rested and expressed the same concerns set out in her Affidavit, trial counsel failed to recall her as a witness.

At the conclusion of the trial on July 18, 2002, Petitioner was found guilty of armed robbery. The jury was unable to agree upon a sentence and on July 19, 2002, the trial court sentenced Mr. Clark to fifty-four (54) years in the custody of the Mississippi Department of Corrections. Mr. Clark was given this sentence, without a pre-sentence investigation, and despite the fact that the Court had allowed the Co-Defendant to plead to a lesser included offense, simple robbery, and received a relatively lenient five (5) year sentence.

Clark's conviction and sentence were affirmed on direct appeal, *Clark v. Mississippi*, 891 So. 2d 136 (Miss. 2004). His Petition for Rehearing was denied on January 20, 2005 and his Petition for Writ of Certiorari to the United States Supreme Court was

denied on May 2, 2005, *Clark v. Mississippi,* 125 S.Ct. 1999, 161 L.Ed. 2d 869, 2005 U.S. Lexis 3864 (2005).

On or about August 15, 2005, Petitioner filed Application for Post-Conviction Relief or, in the Alternative, Leave to File Motion to Vacate Judgment and Sentence in the Mississippi Supreme Court. By Order filed September 23, 2005, said application was denied.

On October 17, 2005, Mr. Clark filed his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody.

On February 6, 2009, United States Magistrate Judge Michael T. Parker, issued Report and Recommendation, recommending that Mr. Clark's Petition for Writ of Habeas Corpus be denied. On February 12, 2009, Clark filed Objections to Report and Recommendation and on March 31, 2009, the District Court entered its Judgment and Order Adopting Report and Recommendation.

On April 16, 2009, the District Court issued Certificate of Appealability as to the *Doyle v. Ohio*, 426 U.S. 610 (1976) (Prosecutor's comment on Petitioner's pre-*Miranda* silence) and the *Crawford v. Washington*, 541 U.S. 36 (2004) (whether admission of Co-Defendant's statement was harmless error) issues. On that same date, Petitioner filed a timely Notice of Appeal. On December 31, 2009, the U.S. Court of Appeals issued its opinion and decision affirming the decision of the district court.

REASONS FOR GRANTING THE PETITION

A. CERTIORARI SHOULD BE GRANTED AS TO WHETHER THE FIFTH CIRCUIT'S ANALYSIS OF THE PROSECUTOR'S COMMENTS REGARDING CLARK'S POST-*MIRANDA* SILENCE IS CONSISTENT WITH *DOYLE V. OHIO*.

In *Doyle, supra*, this Court held that the due process clause prohibits the government from using a Defendant's post arrest, post-*Miranda* silence to create an inference of guilt. During the following colloquy Assistant District Attorney Burdick attempts to mask a calculated mention of Mr. Clark's post-*Miranda* silence:

> "Q. (Mr. Burdick): Ok. Well, you invoked your *Miranda* rights and the Fifth Amendment of the United States Constitution and refused to talk, which is your right, and I respect that. But when was the first time you told someone – when was the first time you told your attorney that you were asleep?
>
> A. I can't recall exactly. I talked to my attorney off and on since this – since I've had this charge.
>
> Q. Did you tell your attorney that you were asleep that night prior to yesterday?
>
> A. Yes, sir."

The only reasonable interpretation of the Assistant District Attorney's line of questioning was to

comment on Defendant's silence. There was no prior inconsistent statement. Any reference to a prior inconsistent statement was a "straw man" argument established by the District Attorney's questioning. The Assistant District Attorney could not reference a prior inconsistent statement and then cross-examine the Defendant regarding that prior inconsistent statement. He only raised the *spectre* of a possible prior inconsistent statement, either to the police or to Mr. Clark's own attorney.

Petitioner should have been granted habeas relief on this issue.

This case is ripe for a grant of certiorari. The Fifth Circuit's decision in this case calls into question whether it is in direct conflict with this Court's decision in *Doyle,* particularly the Court's language at 426 U.S. 619 fn. 11:

> " . . . that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest."

The Fifth Circuit defines a *Doyle* violation as follows:

> "For there to be a *Doyle* violation, the court must find that the 'manifest intent' of the

> remarks was to comment on the Defendant's silence or, alternatively, 'the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the Defendant's silence'."

In support of this test, the Fifth Circuit cites its own decision in *United States v. Shaw,* 701 F.2d 367, 381 (5th Cir. 1983), and in attempting to show that the jury would not construe the District Attorney's remarks as a comment on Petitioner's silence, the Court states as follows:

> "Instead, it reflects an attempt to clarify when Clark first told someone that he was sick and in bed at the time of the robbery; or it reflects an inquiry into the possibility that Clark had made prior inconsistent statements to the police and in his testimony."

Petitioner submits that "inquiry into the possibility" of a prior inconsistent statement to the police is clearly outside of the framework set forth in *Doyle* at 426 U.S. 619 fn. 11, *supra*. Likewise, the Prosecutor's cross-examination in this case does not constitute a "fair response" such as the Prosecutor's closing argument which was upheld in *United States v. Robinson,* 485 U.S. 25, 33 (1988).

Here, Mr. Clark made no claim that he gave the police a prior statement consistent with his trial testimony or that he gave the police any statement. Clark specifically testified, as set forth in the United States Magistrate's Report and Recommendation that he made no statement whatsoever to the police. Thus,

there is simply no basis for the cross-examination and the reference to Clark's post-*Miranda* silence. As noted, the only reasonable purpose for the comment by the Assistant District Attorney is to reinforce to the jury that Clark chose to remain silent after his arrest and to create an inference of guilt from his silence. The Fifth Circuit's alternative test in *Shaw* could have applied in this case, consistent with *Doyle*, if Mr. Clark claimed to have made a prior statement to the police consistent with his trial testimony when in fact he had remained silent, but Mr. Clark made no such claim at trial.

In *Doyle*, this Court stated as follows:

> "Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See *United States v. Hale, supra,* at 177. Moreover, while it is true that the *Miranda* warnings contain no expressed assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warning. In such circumstances, it would fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. 617-618.

The Fifth Circuit's *Doyle* analysis cynically disregards the language and holding of this Court. The Fifth Circuit no only attempts to justify the Prosecutor's comments as an "inquiry into the possibility"

of a prior consistent statement to the police, but then in an internal contradiction characterizes the Prosecutor's comments and cross-examination as an "attempt to use the conversations between a defendant and his counsel." The Fifth Circuit refuses to accept this Court's clear statement in *Doyle* that a Defendant's decision to remain silent is "insolubly ambiguous" and not subject to cross-examination or comment by the Prosecutor unless it meets the narrow exception set forth at 42 U.S. 619 fn. 11, *supra*.

Having found no underlying *Doyle* violation, the Fifth Circuit does not address the "harmless error" or *Brecht v. Abrahamson*, 507 U.S. 619 (1993) issue. For reasons addressed, *supra*, Petitioner submits the Fifth Circuit's analysis is incorrect and certiorari should be granted as to whether or not there was an unreasonable misapplication of *Doyle* by the Fifth Circuit in this case. See *Williams v. Taylor*, 529 U.S. 362 (2000).

B. CERTIORARI SHOULD BE GRANTED AS TO WHETHER THE PROSECUTOR'S EXTENSIVE USE OF MICHAEL BARNES' ADMITTEDLY INADMISSIBLE STATEMENT PROHIBITS A FINDING OF ADMISSIBILITY UNDER *BRECHT*.

The State and the Mississippi Supreme Court agree that the admission of the Co-Defendant's statement was an error, although the Mississippi Supreme Court concluded it was a harmless error.

At trial, after beginning his testimony, Michael Barnes, Mr. Clark's Co-Defendant, refused to testify further concerning the robbery, even after ordered by the trial judge. The State then called as a witness, Detective Rusty Keys, from the Hattiesburg Police Department, to read into evidence the statement Mr. Barnes had given regarding his activities on the night of the robbery. The statement strongly implicated Petitioner as the gunman during the robbery, and was signed by Mr. Barnes as well as the detective. The statement was admitted over defense counsel's objection.

Before refusing to testify, Mr. Barnes testified that Mr. Clark was not with him on the night in question and that the only reason he implicated Clifton Clark in his statement was because he was under the impression that Clark had accused Mr. Barnes, so he was trying to "shoot back at him."

In *Bruton v. U.S.*, 391 U.S. 123, 126 (1968), this Court held that the admission of an accomplice's statement into the record at the trial of the criminal defendant, violated the defendant's Sixth Amendment right where the accomplice did not testify, because defendant was denied an opportunity to cross-examine him. *Bruton,* 391 U.S. at 126. More recently, in *Crawford v. Washington,* 541 U.S. 36 (2004), this Court clarified that testimonial statements are not admissible against a criminal defendant unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine him. *Crawford,* 541 U.S. at 68-79.

Michael Barnes' statement was a central and critical part of the State's case against the defendant, Clifton Clark. During closing argument, Nelson Estus, Assistant District Attorney, described Mr. Barnes' statement as follows:

> "Next, we called Michael Barnes, who is the co-defendant. Boy oh boy, Michael Barnes – well, he stood up here and I think we all saw what happened with Michael. He got the stand (sic) and refused to testify. The Judge instructed you that you are not to consider – what you are to consider and what you may consider is this statement that he gave to Detective Rusty Keys. This is marked as Exhibit 2.
>
> You will have it back there when you go back to the jury room to deliberate; I want you to look at it. It's pretty darn specific. He goes over and talks about the arm robbery, and he talks about, which is very important, who was with him.
>
> He called him Cliff Clark, who is sitting over at the defense table, who is the Defendant in this case. And unequivocally he goes through this statement and talks about how they came up with the plan, how they went in to that store and robbed the two young ladies and got $186.09 for their trouble.
>
> I hope that you will look at this when you go back to the jury room. It's very enlightening."

It is significant that Mr. Barnes was a co-defendant in this case. Thus, his confession must be seen in the same light as any defendant's confession, i.e., a defendant's confession is "probably the most probative and damaging evidence that can be admitted against him." *Cruz v. New York*, 481 U.S. 186, 195, 107 S.Ct. 1714, 95 L.Ed. 2d 162 (1987); see also *Arizona v. Fulminante*, 499 U.S. 279, 292, 111 S.Ct. 1246, 113 L.Ed. 2d 103 (1991).

In *Arizona v. Fulminante, supra,* Justice White delivered the opinion of the Court which affirmed the reversal by the Texas Appellate Court of the trial court which had erroneously admitted Defendant's alleged confession into evidence. Justice White was in the minority as to whether or not the harmless error analysis applied to these circumstances, opining that it did not. However, even when applying the harmless-error analysis, the Court in *Fulminante*, like the Texas appellate court, found that the trial court had erred in admitting the confession at issue into evidence.

In *Cruz v. New York, supra,* this Court held that the admission, at a joint criminal trial, of the non-testifying Co-Defendant's confession was a violation of Defendant's Sixth Amendment confrontation rights, even though Defendant's own confession was also admitted. The independent evidence of guilt in *Cruz,* where Defendant's own confession was admitted, was substantially stronger than any independent evidence established in this case.

This Court's decisions in *Fulminante, Cruz* and *Crawford v. Washington, supra,* resulted in decisions favorable to the Defendant.

The test for harmless error in a federal habeas action is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, supra.* Under *Brecht,* "a constitutional trial error is not so harmful as to entitle a defendant to habeas relief unless there is more than a reasonable possibility that it contributed to the verdict." *Nixon v. Epps,* 405 F.3d 318, 329-330 (5th Cir. 2005), *cert. denied,* 546 U.S. 1016 (2005).

In *Kotteakos v. United States,* 328 U.S. 750 (1946), the Court articulated the test reaffirmed in *Brecht* as follows:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 765.

See also *O'Neal v. McAninch,* 513 U.S. 432, 438 (1995).

The closing argument of the Assistant District Attorney cannot but leave "grave doubt" as to the conviction in this case, i.e., it is more than a reasonable possibility that his closing argument had "a substantial and injurious effect or influence in determining the jury's verdict." In a relatively short closing statement, the Assistant District Attorney enthusiastically

chose to highlight Mr. Barnes' statement, introducing his reference to Barnes' statement with the words, – "Boy, oh boy . . . "! He encourages the jury to review Barnes' statement during deliberations.

Nevertheless, the Fifth Circuit found that the "improperly introduced testimony did not have a substantial and injurious effect or influence in determining the jury's verdict." The Fifth Circuit relies on the testimony of Mandy Weathers and LaTosha Fairley as well as its analysis of the surveillance video. The Fifth Circuit fails to acknowledge the "devastating" effect of a co-defendant's incriminating statement as discussed in both *Cruz* and *Crawford v. Washington.* In *Cruz,* the Court reversed Defendant's conviction, because of the admission of the Co-Defendant's statement, even though the Defendant himself had admitted to the crime in a detailed confession. In *Crawford v. Washington,* the Court stated as follows as to the inadmissibility of a Co-Defendant's statement:

> "In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. . . . we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: *confrontation.*" 51 U.S. at 68. (Emphasis supplied.)

Regardless of the testimony of Weathers and Fairley, and regardless of the surveillance video, the Assistant District Attorney chose to emphasis Mr. Barnes' statement during closing argument. Where the prosecuting attorney substantially relies on evidence inadmissible under the *Bruton-Crawford* line of cases, neither "harmless error" under *Chapman v. California*, 386 U.S. 18 (1967) nor "substantial influence" under *Brecht* should be allowed to apply. The Court should grant certiorari in this case to draw that bright line.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL ADELMAN, ESQUIRE
MS Bar No. 1153
ADELMAN & STEEN, L.L.P.
Post Office Box 368
Hattiesburg, MS 39403-0368
601/544-8291; 601/544-1421 (FAX)
Adelst33@aol.com

Counsel for Petitioner, Clifton Clark

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60293
Summary Calendar

Clifton CLARK,

Petitioner-Appellant,

v.

CHRISTOPHER B. EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:05-CV-2086

(Filed Dec. 31, 2009)

Before JOLLY, WIENER, and ELROD, Circuit Judges.

PER CURIAM:*

Petitioner Clifton Clark appeals the decision of the district court, dismissing his petition under

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

28 U.S.C. § 2254 with prejudice. At issue is the district court's conclusion that the following two decisions of the Mississippi Supreme Court, denying Clark's requests for post-conviction relief, was not contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court. First, the Mississippi Supreme Court held that the admission of the statement of Clark's co-defendant, Michael Barnes, in violation of the Confrontation Clause, was harmless error. Second, it held that the failure of Clark's counsel to object to certain statements by the prosecutor that allegedly commented on his post-*Miranda* silence was not ineffective assistance of counsel. For the reasons set forth below, we affirm.

I.

Clark is currently serving a 54-year term of imprisonment after a Mississippi jury convicted him of armed robbery. On direct appeal, he argued that the trial court violated his rights under the Confrontation Clause by admitting, over his objection, Barnes's statement that Clark was the gunman during the robbery. The Mississippi Supreme Court agreed that the trial court had erred in admitting the statement but found that the error was harmless. *See Clark v. State*, 891 So.2d 136, 142 (Miss. 2004). Clark then moved for collateral relief in state court. In it, he alleged, inter alia, that the error was not harmless. In addition, he contended that the prosecutor violated his right to due process, as established in *Doyle v.*

Ohio, 426 U.S. 610, 618 (1976), by commenting on his post-*Miranda* silence and his counsel's failure to object to those comments constituted ineffective assistance of counsel. The Mississippi Supreme Court denied this application. It found that the harmless-error claim was procedurally barred under Miss. Code Ann. 99-39-21(3) (1984). It found that the claim, challenging the prosecutor's alleged comments about his post-*Miranda* silence, was procedurally barred under Miss. Code Ann. 99-39-21(1) (1984). The Mississippi Supreme Court found that the related ineffective-assistance-of-counsel claim failed to satisfy the standards set forth in *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

Clark then filed this petition under § 2254. In the petition, he re-asserted the harmless-error and ineffective-assistance-of-counsel claims. The magistrate judge found that the Confrontation Clause violation was harmless in light of the other overwhelming and incriminating evidence. The magistrate judge further held that the *Doyle* claim was procedurally barred but that the related claim for ineffective assistance of counsel was not. After analyzing the transcript, the magistrate judge concluded that the cross-examination at issue was not a violation under *Doyle,* 426 U.S. at 618, and that even if it was, the error was harmless. As such, he held that the Mississippi Supreme Court's rejection of this ineffective-assistance-of-counsel claim was neither contrary to nor an unreasonable application of *Strickland,* 466 U.S. at 687.

The district court adopted these findings and dismissed the petition with prejudice, but it granted a certificate of appealability on two issues: (1) whether the prosecutor improperly commented on Clark's post-*Miranda* silence and whether Clark's counsel's failure to object to those comments was constitutionally ineffective; and (2) whether the Confrontation Clause violation was harmless.[1] Clark filed a timely notice of appeal. We find that, because the prosecutor's comments did not violate *Doyle,* 426 U.S. at 618, the failure of Clark's counsel to object to those comments was not constitutionally ineffective. Furthermore, the Confrontation Clause violation was harmless. As such, we affirm the decision of the district court.

II.

Because Clark filed his habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 2254, review of his petition is governed by the procedures and standards provided therein. *See Parr v. Quarterman,* 472 F.3d 245, 251-52 (5th Cir. 2006). When a state court has adjudicated a prisoner's claim on the

[1] In his brief, Clark alleges that his appellate counsel's failure to raise the harmless-error issue was "clearly a violation of *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny, mandating the grant of habeas relief in this case." (Appellant's Brief at 11-12.) This argument is beyond the scope of review authorized by the certificate of appealability, and thus, we decline to address it here. *Kiser v. Johnson,* 163 F.3d 326, 327 n.1 (5th Cir. 1999).

merits, we must defer to the state court and deny the prisoner's habeas claim unless the state court's adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

§ 2254(d)(1)-(d)(2). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court clarified these provisions. Justice O'Connor wrote in her majority opinion that a state court's decision

> will certainly be contrary to [the United States Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases . . . [or] if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405-06.

In reviewing the denial of habeas relief, the court examines factual findings for clear error, and it reviews, de novo, questions of law and mixed questions

of law and fact. *Carty v. Thaler,* 583 F.3d 244, 252-53 (5th Cir. 2009) (citations omitted).

III.

We first address Clark's claim for ineffective assistance of counsel. Our standards for evaluating such claims under *Strickland,* 466 U.S. at 687, are well established:

> First, [a defendant] must demonstrate that his attorney's performance fell below an objective standard of reasonableness. This court has described that standard as "requiring that counsel research relevant facts and law, or make an informed decision that certain avenues will not be fruitful." Second, [a defendant] must also prove that he was prejudiced by his attorney's substandard performance. "[T]o prove prejudice, [a defendant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

United States v. Herrera, 412 F.3d 577, 580 (5th Cir. 2005) (footnotes omitted) (quoting *United States v. Conley,* 349 F.3d 837, 841 (5th Cir. 2003)). Here, Clark complains about his counsel's failure to object to the prosecutor's remarks that allegedly violated his due-process rights under *Doyle,* 426 U.S. at 618.

The Due Process Clause prohibits the prosecutor from using a defendant's post-arrest, post-*Miranda* silence to impeach the defendant's exculpatory story.

See Doyle, 426 U.S. at 618. "Although virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation, a prosecutor's comments must be viewed in context." *United States v. Pennington*, 20 F.3d 593, 599 (5th Cir. 1994) (citation and internal quotation marks omitted). For there to be a *Doyle* violation, the court must find that the "manifest intent" of the remarks was to comment on the defendant's silence or, alternatively, "the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *United States v. Shaw*, 701 F.2d 367, 381 (5th Cir. 1983) (citations and internal quotation marks omitted).

We agree with the district court that the remarks at issue do not meet this standard. Clark complains only about the following portions of his cross examination:

> Q: Ok. Well, you invoked your *Miranda* rights and the Fifth Amendment of the United States Constitution and refused to talk, which is your right, and I respect that. But when was the *first time* you told someone – when was the first time you told *your attorney* that you were asleep?
>
> A: I can't recall exactly. I talked to my attorney off and on since this – since I've had this charge.
>
> Q: Did you tell *your attorney* that you were asleep that night prior to yesterday?

A: Yes, sir.

(Appellant's Brief at 16-17 (citation omitted) (emphasis added).) This exchange does not reflect a manifest intent by the prosecutor to use Clark's post-*Miranda* silence to impeach his exculpatory story. Nor would a jury naturally and necessarily construe it as such. Instead, it reflects an attempt to clarify when Clark first told someone that he was sick and in bed at the time of the robbery; or it reflects an inquiry into the possibility that Clark had made prior inconsistent statements to the police and in his testimony. Indeed, the prosecutor made clear that his questions were not directed at Clark's refusal to speak to the police post-*Miranda*. And consistent with this limitation, the questions at issue focused on when Clark told *his attorney* the alibi. *Doyle,* 426 U.S. at 618, covers the use of a defendant's post-*Miranda* refusal to speak to the police; it does not cover a prosecutor's attempt to use the conversations between a defendant and his counsel.

Other portions of the transcript also show that the prosecutor was testing Clark's alibi by trying to establish when Clark first told someone that he was sick and in bed on the night in question. The magistrate judge noted that, on direct examination, Clark claimed that he was sick and in bed at the time of the robbery. The magistrate judge also pointed to portions of the transcript showing that, immediately before the complained-about exchange, the prosecutor asked, "So you've come up with the sleep idea since this trial? . . . When did you come up with the sleep idea?"

Under these circumstances, we find that the district court properly concluded that there was no *Doyle* violation. As such, we affirm its finding that the Mississippi Supreme Court's decision – that defense counsel's failure to object to this exchange on *Doyle* grounds does not constitute ineffective assistance of counsel – is not contrary to or an unreasonable application of *Strickland,* 466 U.S. at 687.

IV.

The Confrontation Clause violation also does not merit habeas relief. Prior to trial, Barnes had told the police that Clark was the gunman during the robbery. But at trial, he testified that Clark was not with him during the robbery. Barnes explained that he had previously implicated Clark because he had believed that Clark had turned him in. Barnes then refused to testify any further, even when the trial judge ordered him to do so. Faced with Barnes's recalcitrance, the trial judge instructed the jury to disregard his prior testimony and then admitted, over Clark's objection, the statement that Barnes had given to the police. It is undisputed that this was a violation of the Confrontation Clause. The only issue before this court is whether the Mississippi Supreme Court properly concluded that the violation was harmless.

"Confrontation Clause violations are subject to harmless error analysis." *Fratta v. Quarterman,* 536 F.3d 485, 507-8 (5th Cir. 2008) (citations omitted). Such a violation is cause for habeas relief only if it

had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (citation omitted). In conducting this analysis, the court considers: (1) the importance of the testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony; and (4) the overall strength of the prosecution's case against the defendant. *Cupit v. Whitley,* 28 F.3d 532, 539 (5th Cir. 1994).(citations omitted). "Of these, the strength of the prosecution's case is probably the single most important factor in determining whether the error was harmless." *Id.* (citations omitted).

The district court adopted the magistrate judge's finding that the properly admitted evidence against Clark was "overwhelming." In light of this evidence, it "[could not] conclude that the error had a 'substantial and injurious effect or influence in determining the jury's verdict.'" Therefore, the district court held that the Mississippi Supreme Court's decision rejecting this claim was neither contrary to nor an unreasonable application of clearly established federal law. We agree.

Even without Barnes's statement, the prosecution's overall case was strong. Mandy Weathers, Clark's roommate at the time of the robbery, testified that she had been alone at home when the robbery had occurred, that she had checked Clark's bedroom and he was not there, and that shortly after the robbery, Clark and Barnes came into her room and

told her that they had committed the robbery. She testified that Clark had given her a gun a few days earlier, and Clark told her that he had used that gun in the robbery. To corroborate Clark's claim, Weathers checked under her bed, where she had stored the gun, and found that it was missing. According to Weathers, Clark said that he would return the gun if she wanted him to, but he would prefer not to. She testified that, shortly after the robbery, Clark threatened her with a gun and told her that he would shoot her for giving the police a statement. Weathers also testified that, prior to trial, Clark offered her a bribe in return for her silence. Clark acknowledges that Weathers testified about his admission, but he fails to explain or point to any evidence of record (other than his own testimony) showing that her testimony is unreliable. (Appellant's Brief at 5-6, 14-15.)

Latosha Fairley, Clark's girlfriend at the time of the robbery, testified that she had reviewed the surveillance video of the robbery, which showed that there were two masked robbers and one of them carried a gun. She testified that the gunman's build and mannerisms resembled Clark "a lot." Fairley also testified that Clark had confessed his involvement to her.[2] Barnes's testimony, identifying Clark as the

---

[2] Shortly after Fairley testified, she informed Clark's counsel that she was no longer certain about that testimony. Clark's counsel then informed the court that Fairley would return to provide additional testimony. Accordingly, Clark's counsel urged

(Continued on following page)

gunman, is cumulative of Weathers and Fairley's testimonies, which reflect Clark's admission that he was the gunman during the robbery.

In addition, eyewitnesses testified that the gunman was significantly taller than his accomplice. The surveillance video, which the jurors viewed, identified the taller of the two robbers as the gunman. Both Weathers and the police investigator testified that Clark was significantly taller than Barnes (about five inches). The testimonies from Weathers, Fairley, the police investigator, and the eyewitnesses, as well as the videotape corroborate Barnes's identification of Clark as the gunman. Indeed, the only conflicting evidence was Clark's testimony, denying his involvement.

Fairley to return to provide the recantation testimony, but she did not. Counsel also attempted to locate her but was unable to. Two days after the trial, Clark filed an affidavit from Fairley, which stated that she could no longer be certain that Clark confessed his involvement to her. Because this questionable recantation was never presented to the jury and subject to cross-examination, we will not consider it in our harmless-error analysis. *See White v. Johnson*, 153 F.3d 197, 201 (5th Cir. 1998) (explaining that the court conducts the harmless-error analysis in the context of "other evidence presented" to the jury so that the court can determine the effect that the improperly admitted testimony had on the trial). We also note that recantations are generally looked upon with the "utmost suspicion." *United States v. Smith*, 433 F.2d 149, 150 (5th Cir. 1970) (citation omitted). Such suspicion is particularly justified here given Fairley's refusal to testify to the recantation and apparent disappearance as well as the evidence that Clark had intimidated and attempted to bribe Weathers.

Clark relies heavily on the prosecutor's summation to demonstrate that the prosecution's case substantially relied upon Barnes's statement. While this characterization may arguably be accurate and may suggest that Barnes's testimony was important to the prosecution's case, the importance of the testimony is only one of several factors that the court weighs. As explained above, all of the other factors point to harmless error, including the most important factor, the overall strength of the prosecution's case. In sum, we find that, when weighed against all of the other compelling, corroborating, and incriminating evidence that was presented to the jury, the improperly introduced testimony did not have a substantial and injurious effect or influence in determining the jury's verdict. Thus, the Mississippi Supreme Court's decision on this issue was not contrary to or an unreasonable application of *Brecht,* 507 U.S. at 637.[3]

---

[3] Contrary to Clark's assertion, the Mississippi Supreme Court did not rely on Barnes's statement to conclude that the Confrontation Clause violation was harmless error. The court specifically stated, "*Despite* this error, *in addition to other* damaging evidence there was direct testimony at trial by [Weathers and Fairley] that Clark had confessed to committing the Amoco robbery. Therefore, due to the overwhelming weight of the evidence, we conclude beyond a reasonable doubt that the violation of the Confrontation Clause was harmless error by the trial court." *Clark v. State,* 891 So.2d 136, 142 (Miss. 2004) (emphasis added).

V.

For the reasons set forth above, we AFFIRM the decision of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CLIFTON CLARK,
MDOC # L2166 **PETITIONER**

versus **CIVIL ACTION NO.**
2:05cv2086-KS-MTP

CHRISTOPHER EPPS,
Commissioner of MDOC;
and JIM HOOD, Attorney
General **RESPONDENTS**

JUDGMENT

This matter having come on to be heard on this date upon the Report and Recommendation of the United States Magistrate Judge entered herein on February 6, 2009, and the Court, after a full review of the record, having adopted said Report and Recommendation as the finding of this Court, finds that this matter should be **dismissed** with prejudice

The plaintiff is hereby notified that, pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure, he has the right to appeal this Order to the United States Court of Appeals for the Fifth Circuit within thirty (30) days of the entry of the final judgment in this matter.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the above captioned cause be, and the same hereby is, **dismissed** with prejudice.

SO ORDERED AND ADJUDGED this the 31st day of March, 2009.

s/ Keith Starrett
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CLIFTON CLARK,
MDOC # L2166 **PETITIONER**

versus **CIVIL ACTION NO.**
2:05cv2086-KS-MTP

CHRISTOPHER EPPS,
Commissioner of MDOC;
and JIM HOOD, Attorney
General **RESPONDENTS**

ORDER ACCEPTING MAGISTRATE JUDGE'S RECOMMENDATION AND DISMISSING CASE WITH PREJUDICE, ETC.

This cause is before the Court on Petition for Writ of Habeas Corpus filed pursuant to 20 U.S.C. §2254 [1] filed by Petitioner, Clifton Clark. The Court has considered the pleadings and the Report and Recommendation of Magistrate Judge Michael T. Parker [14], the Response in Opposition to Report and Recommendation [15], the Response in Opposition [16] and Reply thereto filed by Petitioner [17] and being fully advised in the premises does hereby find as follows, to-wit:

1. PROCEDURAL HISTORY

Following a jury trial, Petitioner was convicted of Armed Robbery in the Circuit Court of Forrest County, Mississippi. After the jury could not agree on a sentence, on July 19, 2002 Circuit Court Judge

Richard McKenzie sentenced Petitioner to a term of fifty-four (54) years imprisonment in the custody of the Mississippi Department of Corrections. *See* Supreme Court Record ("SCR"), vol. 1 at 34-35.

Petitioner then appealed his conviction and sentence, raising two issues. First, Petitioner argued that his Sixth Amendment right to confront and cross-examine a witness was violated when the trial court admitted, over objection, a statement into evidence by Petitioner's co-defendant after the co-defendant refused to testify at Petitioner's trial. Additionally, Petitioner argued that the trial court compounded its error when it refused his two requested limiting instructions. The Mississippi Supreme Court found that the trial court erred in admitting the codefendant's statement, but that the error was harmless. As the trial court's error was harmless, the Supreme Court held that the court's refusal of Petitioner's requested limiting instructions was, at most, harmless as well. Accordingly, the Supreme Court affirmed Petitioner's conviction and sentence. *See Clark v. Mississippi,* 891 So.2d 136 (Miss. 2004), *reh'g denied,* Jan. 20, 2005, cert. denied, 125 S.Ct. 1999 (2005).

On August 16, 2005, Petitioner, through counsel, filed an Application for Post-Conviction Relief or, in the Alternative, Leave to File a Motion to Vacate Judgment and Sentence with the Mississippi Supreme Court. In his Application, Petitioner raised the following seven claims: 1) Petitioner's sentence violated the Eighth and Fourteenth Amendments;

2) Ineffective assistance of counsel based on trial counsel's failure to argue for transfer pursuant to Miss. Code Ann. § 43-21-159; 3) Ineffective assistance of counsel based on trial counsel's failure to argue that Petitioner's sentence was disproportionately unconstitutional; 4) improper and reversible error on the part of the District Attorney, who raised Petitioner's post-*Miranda* silence at trial, and ineffective assistance of counsel based on trial counsel's failure to object to the District Attorney's comments; 5) the admission of Petitioner's co-defendant's statement was not harmless error; 6) ineffective assistance of counsel on direct appeal; 7) ineffective assistance of counsel when trial counsel failed to subpoena and recall Latosha Fairley as a witness at trial.

On September 21, 2005, the Mississippi Supreme Court denied Petitioner's Application. The Supreme Court found that Petitioner's claims of ineffective assistance of counsel failed to meet the standards required by *Strickland v. Washington,* 466 U.S. 668 (1984), that Petitioner's sentence was proper, and that Petitioner had failed to make a showing, as required by Miss. Code Ann. § 99-39-27(5) that his state or federal rights had been denied. The Supreme Court found that each of Petitioner's remaining claims was procedurally barred. *See* SCR "Miscellaneous Pleadings" volume.

Petitioner, through counsel, filed the instant Petition on October 17, 2005, raising the following grounds:

Ground One: Petitioner's sentence is in violation of the Eighth and Fourteenth Amendments;

Ground Two: Denial of effective assistance of counsel – Counsel failed to argue for transfer pursuant to Miss. Code Ann. § 43-21-159;

Ground Three: Denial of effective assistance of counsel – Counsel failed to argue that Petitioner's fifty-four (54) year sentence was disproportionately unconstitutional;

Ground Four: (a) Improper and reversible error for the District Attorney to comment on Defendant's post-*Miranda* silence, and (b) denial of effective assistance of counsel – Counsel failed to object to the District Attorney's impermissible comments[1];

Ground Five: Admission of co-defendant Michael Barnes's statement was not harmless error;

Ground Six: Denial of effective assistance of counsel on direct appeal – Counsel failed to address harmless error argument; and

---

[1] Petitioner states two claims under Ground Four: the reversible error of the District Attorney's comments, and the ineffective assistance of counsel. The Mississippi Supreme Court addressed these claims individually when ruling on Plaintiff's Application for Post-Conviction Relief. Accordingly, this Court will identify the claims stated under Ground Four as Sub-parts (a) and (b), as identified by Respondents in their Response [7].

Ground Seven: Denial of effective assistance of counsel – Counsel failed to subpoena and recall Latosha Fairley as a witness.

Petition at 3-13.

II. STANDARD OF REVIEW

When a party objects to a Report and Recommendation this Court is required to "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). See also *Longmire v. Gust,* 921 F.2d 620, 623 (5th Cir. 1991) (Party is "entitled to a *de novo* review by an Article III Judge as to those issues to which an objection is made.") Such review means that this Court will examine the entire record and will make an independent assessment of the law. The Court is not required, however, to reiterate the findings and conclusions of the Magistrate Judge. *Koetting v. Thompson,* 995 F.2d 37, 40 (5th Cir. 1993) nor need it consider objections that are frivolous, conclusive or general in nature. *Battle v. United States Parole Commission,* 834 F.2d 419, 421 (5th Cir. 1997). No factual objection is raised when a petitioner merely reurges arguments contained in the original petition. *Edmond v. Collins,* 8 F.3d 290, 293 (5th Cir. 1993).

III. PETITIONER'S OBJECTIONS AND ANALYSIS

Petitioner's objections are succinctly set forth in [15] Objections to Report and Recommendation.

Ground One: Petitioner's sentence is in violation of the Eighth and Fourteenth Amendments;

Unfortunately there is no bright line test to determine whether a sentence is "grossly disproportionate" to the crime committed. The crime that defendant was before the Court on is armed robbery, which is an extremely dangerous crime that is punishable by life in prison if said sentence is imposed by the jury, and if the jury cannot agree on a sentence, then the sentence should be a term reasonably expected to be less than life but greater than three years.

In establishing that the sentence petitioner received violates the Eighth Amendment to the U.S. Constitution, he carries a heavy burden and in only rare instances should this Court make such a finding. The sentence of 54 years is clearly within the statutory limits. There is also a presumption of constitutionality by showing that the sentence is within the statutory limits. *Stewart v. Stalder,* 2007 WL 1890706, at *12 (E.D. La. June 28, 2007) citing *Bonner v. Henderson,* 517 F.2d 135, 136 (5th Cir. 1975); *Nicks v. Cain,* 2005 WL 1578024, at *8 (E.D. La. June 30, 2005).

The Supreme Court of Mississippi has almost always affirmed the trial judge's sentence when it is within the statutory limits. It is unfortunate that the petitioner was only 20 years old at the time of the sentence and it is unfortunate that the crime was

committed with a firearm. However, the standard to establish an error of constitutional proportions is a steep one. This Court finds that the petitioner has failed to rebut the presumption of constitutionality by showing that his situation is exceptional and the Court finds that Ground 1 has no basis and petitioner's claim for relief in Ground 1 should be denied.

> *Ground Three*: Denial of effective assistance of counsel – Counsel failed to argue that Petitioner's fifty-four (54) year sentence was disproportionately unconstitutional;

In this case the co-defendant was sentenced to five years for simple robbery. The petitioner in this case was sentenced to 54 years for armed robbery. There is obviously a significant difference in the sentences.

The standard by which all ineffective assistance of counsel claims must pass is set forth in *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In order to establish constitutionally deficient counsel, the petitioner must show:

1. Counsel's performance was deficient and
2. That the deficient performance prejudiced the defense.

To show this, the errors of counsel must be constitutionally deficient and not functioning as counsel guaranteed by the Sixth Amendment. The petitioner must affirmatively prove prejudice by *Vonvillain v. Blackburn,* 780 F.2d 1248, 1253 (5th Cir. 1986). In

order to prove prejudice a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Motley v. Collins,* 18 F.3d at 1223 (5th Cir. 1994) (citing *Strickland,* 466 U.S. at 694). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*. Moreover, a petitioner must establish that "'the result of the proceedings was fundamentally unfair or unreliable.'" *Vuong v. Scott,* 62 F.3d 673, 685 (5th Cir. 1995) quoting *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993).

It is not necessary for counsel to argue every potential error and attorneys are given discretion to pick the best errors for appellate review. The case law in Mississippi is extremely consistent and the counsel for petitioner chose not to raise the issue of disproportionality in his state court appeal. This Court cannot say that this decision was both deficient and prejudicial under the *Strickland* standard and the Court finds that habeas relief should be denied on this claim.

> *Ground Four*: (a) Improper and reversible error for the District Attorney to comment on Defendant's post-*Miranda* silence, and (b) denial of effective assistance of counsel – Counsel failed to object to the District Attorney's impermissible comments;

In the Report and Recommendation the Magistrate Judge sets forth the complained of testimony. This Court finds that when all of the testimony is

taken into consideration, this Court cannot find that the questioning by the prosecutor is a veiled attempt to disclose post-*Miranda* silence of the defendant. The prosecutor is allowed to cross-examine regarding prior inconsistent statements. The prosecutor's complained of language is "Okay. Well, you invoked your *Miranda* rights and the Fifth Amendment to the United States Constitution and refused to talk, which is your right, and I respect that. But when was the first time you told someone – when was the first time you told your attorney that you were asleep?"

The petitioner had apparently claimed an alibi for the first time at trial. As the testimony continues, the petitioner is questioned about whether or not he attempted to explain his alibi to the police on the night of the incident. This Court finds nothing untoward or malicious regarding the prosecutor's comments. It was an unfortunate aside, but the context of the questioning was fair game for the prosecutor to pursue. This Court finds that the Magistrate Judge's analysis is proper and that the Mississippi Supreme Court's rejection of this claim did not involve an unreasonable application of *Strickland,* and this ground does not provide basis for habeas relief.

> *Ground Five*: Admission of co-defendant Michael Barnes's statement was not harmless error;

Michael Barnes was the co-defendant with petitioner. Barnes had given a statement implicating petitioner and pointing to petitioner as the one with

the gun. The statement was entered into evidence after Barnes refused to testify. The statement was not "Brutonized" and its admission is a clear violation of the precedent set forth by *Crawford v. Washington,* 541 U.S. 36 (2004).

However, "confrontation clause errors . . . are subject to harmless error analysis," *U.S. v. Fields,* 483 F.3d 313, 378 (5th Cir. 2007) (citation omitted); See also *Kettelson v. Dretke,* 426 F.3d 306, 319 (5th Cir. 2005). The Mississippi Supreme Court found that the overwhelming evidence opposing petitioner demonstrated that the trial court's error was harmless. The other evidence against the defendant included an in-store video, the witnesses' accounts of petitioner's admission, and other testimony, and the Mississippi Supreme Court found that the Barnes statement was cumulative to the overwhelming and largely uncontroverted evidence before the jury. The decision of the Mississippi Supreme Court on this issue is neither contrary to nor an unreasonable application of clearly established federal law. Petitioner's claim for habeas relief on this ground should be denied.

> *Ground Seven*: Denial of effective assistance of counsel – Counsel failed to subpoena and recall Latosha Fairley as a witness.

Ms. Fairley testified against petitioner and an admission of guilt that he made to her. Following her testimony she, to some extent, recanted and defense counsel was to recall her to stand but did not subpoena her and she never reappeared to provide the

additional testimony. Petitioner argues that trial counsel's failure to subpoena Ms. Fairley constituted ineffective assistance of counsel. Judge Parker's analysis is proper on this issue. Ms. Fairley apparently came to defense counsel during the lunch period and told him of her second thoughts. However, her concern did not lead her to stick around afer [sic] lunch. Granted, defense counsel could have had her subpoenaed if he had gone to the clerk and had an *instanter* subpoena issued and served her immediately. The logistics of all of this are difficult and in light of the fact that Ms. Fairley came to him, this Court cannot say that the decisions made by the defense counsel were unreasonable.

Taking all of this into consideration, this Court finds that the Mississippi Supreme Court's rejection of this claim did not involve an unreasonable application of *Strickland,* and habeas relief should be denied on this claim.

IV. CONCLUSION

As required by 28 U.S.C. § 636(b)(1) this Court has conducted an independent review of the entire record and a *de novo* review of the matters raised by the objections. For the reasons set forth above, this Court concludes that Clark' [sic] objections lack merit and should be overruled. The Court further concludes that the Report and Recommendation is an accurate statement of the facts and the correct analysis of the law in all regards. Therefore, the Court accepts,

approves and adopts the Magistrate Judges's factual findings and legal conclusions contained in the Report and Recommendation. Accordingly, it is ordered that the United States Magistrate Judge Michael T. Parker's Report and Recommendation is accepted pursuant to 28 U.S.C. § 636(b)(1) and that Clifton Clark's claim is **dismissed with prejudice**. All other pending motions are denied as moot.

SO ORDERED this, 31st day of March, 2009.

s/ Keith Starrett
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CLIFTON CLARK — **PETITIONER**

versus

CHRISTOPHER EPPS, Commissioner of MDOC; and JIM HOOD, Attorney General — **RESPONDENTS**

CIVIL ACTION NO. 2:05cv2086-KS-MTP

REPORT AND RECOMMENDATION

BEFORE THE COURT is a Petition for Writ of Habeas Corpus under 29 U.S.C. § 2254 [1] (the "Petition") filed by Petitioner Clifton Clark. Having considered the Petition, the Response [7] to Petition, the Traverse [8], the record of the state court proceedings and the applicable law, the undersigned is of the opinion that Petitioner's request for relief pursuant to 28 U.S.C. § 2254 should be DENIED.

PROCEDURAL HISTORY

Following a jury trial, Petitioner was convicted of Armed Robbery in the Circuit Court of Forrest County, Mississippi. After the jury could not agree on a sentence, on July 19, 2002 Circuit Court Judge Richard McKenzie sentenced Petitioner to a term of fifty-four (54) years imprisonment in the custody of the Mississippi Department of Corrections. *See* Supreme Court Record ("SCR"), vol. 1 at 34-35.

Petitioner then appealed his conviction and sentence, raising two issues. First, Petitioner argued that his Sixth Amendment right to confront and cross-examine a witness was violated when the trial court admitted, over objection, a statement into evidence by Petitioner's co-defendant after the co-defendant refused to testify at Petitioner's trial. Additionally, Petitioner argued that the trial court compounded its error when it refused his two requested limiting instructions. The Mississippi Supreme Court found that the trial court erred in admitting the co-defendant's statement, but that the error was harmless. As the trial court's error was harmless, the Supreme Court held that the court's refusal of Petitioner's requested limiting instructions was, at most, harmless as well. Accordingly, the Supreme Court affirmed Petitioner's conviction and sentence. *See Clark v. Mississippi,* 891 So.2d 136 (Miss. 2004), *reh'g denied,* Jan. 20, 2005, cert. denied, 125 S.Ct. 1999 (2005).

On August 16, 2005, Petitioner, through counsel, filed an Application for Post-Conviction Relief or, in the Alternative, Leave to File a Motion to Vacate Judgment and Sentence with the Mississippi Supreme Court. In his Application, Petitioner raised the following seven claims: 1) Petitioner's sentence violated the Eighth and Fourteenth Amendments; 2) Ineffective assistance of counsel based on trial counsel's failure to argue for transfer pursuant to Miss. Code Ann. § 43-21-159; 3) Ineffective assistance

of counsel based on trial counsel's failure to argue that Petitioner's sentence was disproportionately unconstitutional; 4) improper and reversible error on the part of the District Attorney, who raised Petitioner's post-*Miranda* silence at trial, and ineffective assistance of counsel based on trial counsel's failure to object to the District Attorney's comments; 5) the admission of Petitioner's co-defendant's statement was not harmless error; 6) ineffective assistance of counsel on direct appeal; 7) ineffective assistance of counsel when trial counsel failed to subpoena and recall Latosha Fairley as a witness at trial.

On September 21, 2005, the Mississippi Supreme Court denied Petitioner's Application. The Supreme Court found that Petitioner's claims of ineffective assistance of counsel failed to meet the standards required by *Strickland v. Washington,* 466 U.S. 668 (1984), that Petitioner's sentence was proper, and that Petitioner had failed to make a showing, as required by Miss. Code Ann. § 99-39-27(5) that his state or federal rights had been denied. The Supreme Court found that each of Petitioner's remaining claims was procedurally barred. *See* SCR "Miscellaneous Pleadings" volume.

Petitioner, through counsel, filed the instant Petition on October 17, 2005, raising the following grounds:

- *Ground One*: Petitioner's sentence is in violation of the Eighth and Fourteenth Amendments;

Ground Two: Denial of effective assistance of counsel – Counsel failed to argue for transfer pursuant to Miss. Code Ann. § 43-21-159;

Ground Three: Denial of effective assistance of counsel – Counsel failed to argue that Petitioner's fifty-four (54) year sentence was disproportionately unconstitutional;

Ground Four: (a) Improper and reversible error for the District Attorney to comment on Defendant's *post-Miranda* silence, and (b) denial of effective assistance of counsel – Counsel failed to object to the District Attorney's impermissible comments[1];

Ground Five: Admission of co-defendant Michael Barnes's statement was not harmless error;

Ground Six: Denial of effective assistance of counsel on direct appeal – Counsel failed to address harmless error argument; and

Ground Seven: Denial of effective assistance of counsel – Counsel failed to subpoena and recall Latosha Fairley as a witness.

Petition at 3-13.

---

[1] Petitioner states two claims under Ground Four: the reversible error of the District Attorney's comments, and the ineffective assistance of counsel. The Mississippi Supreme Court addressed these claims individually when ruling on Plaintiff's Application for Post-Conviction Relief. Accordingly, this Court will identify the claims stated under Ground Four as Sub-parts (a) and (b), as identified by Respondents in their Response [7].

THE STANDARD OF REVIEW

As the Petition was filed after the effective date of The Antiterrorism and Effective Death Penalty Act ("AEDPA"), the AEDPA and case law interpreting it provide the standards under which the Petition must be evaluated. *See Neal v. Puckett,* 286 F.3d 230, 235 (5th Cir. 2002), *cert. denied,* 537 U.S. 1104 (2003). As an initial matter, exhaustion of state remedies is a mandatory prerequisite to federal habeas relief under 28 U.S.C. § 2254:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that –
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . . .
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

To satisfy the exhaustion requirement, a petitioner must first present his claims to the highest state court in a procedurally proper manner so that it is given a fair opportunity to consider and pass upon challenges to a conviction before those issues come to federal court for habeas corpus review. O'Sullivan *v. Boerckel,* 526 U.S. 838, 844-45 (1999). This is so because state courts, "like federal courts, are obliged to enforce federal law." *Id.* at 844. Thus, "when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Id.* Exhaustion results from the petitioner's pursuit of his claims through state courts either by direct appeal or by post-conviction proceedings. *See Orman v. Cain,* 228 F.3d 616, 619-20 & n.6 (5th Cir. 2000).

Along with its determination of whether the petitioner has exhausted state court remedies, this Court must also determine whether the state court has decided the asserted claim on the merits, thus barring habeas relief except under very limited circumstances. AEDPA provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application

> of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Federal courts review pure questions of law, as well as mixed questions of law and fact, under subsection (d)(1). *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000); *Corwin v. Johnson*, 150 F.3d 467, 471 (5th Cir. 1998). The "unreasonable application" inquiry is based on an objective standard, and for purposes of the (d)(1) analysis, "unreasonable" does not equate with "incorrect." *Garcia v. Dretke*, 388 F.3d 496, 500 (5th Cir. 2004). Rather, the application of clearly-established precedent must be both incorrect *and* unreasonable for federal habeas relief to be warranted. *Id.*

Pure questions of fact are reviewed under subsection (d)(2). *Corwin*, 150 F.3d at 471. A state court's determination of a factual issue is entitled to a presumption of correctness which the petitioner has the burden of rebutting by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). *See also Schriro v. Landrigan*, 127 S.Ct. 1933, 1939-40 (2007).

It is against this backdrop that Petitioner's claims must be reviewed – with the added observation that a federal court does not "sit as a 'super'

state supreme court" and may decide the issues presented by the habeas petition "only to the extent that federal constitutional issues are implicated." *Smith v. McCotter,* 786 F.2d 697, 700 (5th Cir. 1986); *see also Mendiola v. Estelle,* 635 F.2d 487, 491 (5th Cir. 1981). "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." *Wainwright v. Goode,* 464 U.S. 78, 83-84 (1993) (citations omitted). Thus, AEDPA provides that the court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *only* on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 29 U.S.C. § 2254(a) (emphasis added). A state's interpretation of its own laws or rules is no basis for federal habeas corpus relief since no constitutional question is involved. *Bronstein v. Wainwright,* 646 F.2d 1048, 1050 (5th Cir. 1981) (citations omitted).

The Procedurally Barred Claims

Respondents contend that Grounds One and Four(a) are procedurally barred from review by this Court because they were held to be procedurally barred from review by the Mississippi Supreme Court. Response at 5.

Under Ground One, Petitioner argues that his sentence violated his Eighth and Fourteenth Amendment rights. Petition at 3. This claim was raised

as Ground I in Petitioner's Application for Post-Conviction Relief, and the Mississippi Supreme Court held that it was "without merit" because Petitioner was properly sentenced under Miss. Code Ann. § 97-3-79. Following that conclusion, the court stated: "Additionally, this issue is procedurally barred pursuant to Miss. Code Ann. § 99-39-21(1).[2] *See* SCR, "Miscellaneous Pleadings" volume. This Court disagrees with Respondents that this claim is procedurally barred. The Fifth Circuit has held that where alternative holdings are provided, a holding on the merits does "not operate to vitiate the validity of a procedural bar that constitutes the primary holding." *Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998) (citation omitted). Here, the procedural bar does not appear to have constituted the primary holding. Rather, it appears that the merits ruling was the primary holding, and the procedural bar was a secondary, additional holding. Accordingly, the court will address the merits of this claim *infra*.

In Ground Four (a), Petitioner argues that it was improper and reversible error for the District Attorney to comment at trial on Defendant's post-*Miranda* silence. Petition at 8. This claim was raised

---

[2] Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred. . . ."

as Ground IV(a) in Petitioner's Application for Post-Conviction Relief, and the Mississippi Supreme Court found that it was procedurally barred pursuant to Miss. Code Ann. 99-39-21(1). *See* SCR, "Miscellaneous Pleadings" volume.

If "a state court declines to hear a prisoner's . . . claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson,* 238 F.3d 631, 634 (5th Cir. 2001). When, as in this case, the state court "clearly and expressly states that its judgment rests on a state procedural bar, a presumption arises that the state court decision rests on independent and adequate state law grounds." *Pitts v. Anderson,* 122 F.3d 275, 279 (5th Cir. 1997). Petitioner may overcome the presumption by establishing that "the state did not strictly or regularly follow a procedural bar around the time of his direct appeal" and that "the state has failed to apply the procedural bar rule to claims identical or similar to those raised by the petitioner himself." *Stokes v. Anderson,* 123 F.3d 858, 860 (5th Cir. 1997). Petitioner has made no such assertions and falls well short of the requisite showing that Mississippi did not strictly or regularly follow these procedural bars. Moreover, the Fifth Circuit has explicitly held that the procedural bar at issue with respect to Ground Four (a) – Miss. Code Ann. §§ 99-39-21(1) – is an independent state procedural bar. *Id.*; *see also Johnson v. Puckett,* 176 F.3d 809, 823-24 (5th Cir.

1999). Accordingly, this claim is procedurally defaulted. *See Stokes,* 123 F.3d at 861.

Where a habeas claim is procedurally barred, it may be considered on the merits by a federal court under two narrow exceptions: "cause and actual prejudice" or "fundamental miscarriage of justice." *Bagwell v. Dretke,* 372 F.3d 748, 755 (5th Cir. 2004), *cert. denied,* 543 U.S. 989 (2004); *see also Coleman v. Thompson,* 501 U.S. 722, 750 (1991) (making this rule "explicit").

To prove cause sufficient to excuse default, a petitioner must establish that some external impediment prevented him from raising the defaulted claims: "'Cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Coleman,* 501 U.S. at 753. Examples of external factors include "interference by officials" and "a showing that the factual or legal basis for a claim was not reasonably available" to the petitioner. *McCleskey v. Zant,* 499 U.S. 467, 493-94 (1991).

As a general matter, "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Coleman,* 501 U.S. at 753 (citations omitted). However, where attorney error constitutes ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984)

and is therefore an "independent constitutional violation," it is "cause" sufficient to excuse default. *Id.* at 754, 755. In *Murray v. Carrier,* 477 U.S. 478, 489 (1986), the U.S. Supreme Court held that before a claim of ineffective assistance of counsel can be used to establish cause to excuse a procedural default, it must be exhausted – *i.e.,* it must be presented as an independent Sixth Amendment claim to the highest state court in a procedurally proper manner. The Court reaffirmed this holding in *Edwards v. Carpenter,* 529 U.S. 446, 462 (2000).

Petitioner did not raise Ground Four (a) as independent ineffective assistance of counsel claims, and, accordingly, he cannot establish cause. The second exception is also inapplicable to this case. Petitioner can not establish that failure of this Court to consider this claim would result in a "fundamental miscarriage of justice." The fundamental miscarriage of justice exception is even more circumscribed than the cause and prejudice exception and is confined to cases of actual innocence, "where the petitioner shows, as a factual matter, that he did not commit the crime of conviction." *Fairman v. Anderson,* 188 F.3d 635, 644 (5th Cir. 1999) (*citing Ward v. Cain,* 53 F.3d 106, 108 (5th Cir. 1995)). To meet this exception, a petitioner must offer "new, reliable evidence that was not presented at trial" and must show that it was "more likely than not that no reasonable juror would

have convicted him in light of the new evidence."[3] *Id.* (citations omitted); *see also Schlup v. Delo,* 513 U.S. 298, 324, 327 (1995). Petitioner has not provided this court with any new evidence bearing on his innocence of the crime of conviction.

As neither of the established exceptions applies, the claim Petitioner asserts under Ground Four (a) is procedurally barred from review. The ineffective assistance of counsel claim asserted by Petitioner under Ground Four (b) is not procedurally-barred, however, and this Court will address that claim below on its merits.[4]

Claims Considered on Their Merits

Ground One

In Ground One, Petitioner argues that his sentence violates the Eighth and Fourteenth Amendments.

Where a sentence is "grossly disproportionate" to the crime committed, the sentence is subject to attack on the grounds that it violates the Eighth

---

[3] Such evidence includes "exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eyewitness accounts, and certain physical evidence." *Fairman,* 188 F.3d at 644.

[4] Respondents do not argue that Petitioner's claim for ineffective assistance of counsel in Ground Four (b) [sic], and the Mississippi Supreme Court addressed this claim on its merits. This Court will do the same *infra.*

Amendment's prohibition of cruel and unusual punishment. *See Lockyer v. Andrade,* 538 U.S. 63, 73 (2003). However, "[a] finding that sentence is grossly disproportional should be made only in 'exceedingly rare' and 'extreme' cases." *McCline v. Epps,* 2008 WL 4457842, at *6 (N.D. Miss. Sept. 30, 2008) (*citing Lockyer,* 538 U.S. at 73); *Stromas v. State,* 618 So. 2d 116, 123 (Miss. 1993) ("Declaring a sentence violative of the Eighth Amendment to the U.S. Constitution carries a heavy burden and only in rare cases should this Court make such a finding."). Where a state sentence is within the statutory limits, the defendant must rebut the presumption of constitutionality by showing that his situation is exceptional. *Stewart v. Stalder,* 2007 WL 1890706, at *12 (E.D. La. June 28, 2007) (*citing Bonner v. Henderson,* 517 F.2d 135, 136 (5th Cir. 1975); *Nicks v. Cain,* 2005 WL 1578024, at *8 (E.D. La. June 30, 2005)).

Under Mississippi law, the maximum penalty for armed robbery is a term of life imprisonment if the jury agrees to impose it. In cases where the jury is unable to agree on a sentence of life imprisonment, the trial judge is to set a sentence "for any term not less than three (3) years" but "reasonably expected to be less than life." Miss. Code Ann. § 97-3-79; *see also Henderson v. State,* 402 So. 2d 325, 329 (Miss. 1981); *Wells v. State,* 936 So. 2d 479, 481 (Miss. Ct. App. 2006); *Calhoun v. State,* 881 So. 2d 308, 311 (Miss. Ct. App. 2004); *Goree v. State,* 750 So. 2d 1260, 1263 (Miss. Ct. App. 1999); *Lenox v. State,* 727 So. 2d 753, 761 (Miss. Ct. App. 1998).

In the instant case, after the jury was unable to agree on a punishment, the judge sentenced Petitioner, who was twenty years old at the time, to a term of fifty-four (54) years. The length of the sentence was based on the normal life expectancy at that time (as set forth in actuarial tables) of a twenty year old white male: 55.5 years. *See* SCR, Sentencing Hearing [11-3]. As this sentence can be "reasonably expected to be less than life," it is within the court's statutory authority. *See, e.g., McCline,* 2008 WL 4457842, at *6 (upholding 45 year sentence for armed robbery for 23 year-old defendant, which defendant argued exceeded his life expectancy, because it was within statutory guidelines);[5] *Henderson,* 402 So. 2d at 328-29 (upholding 41 year sentence for armed robbery where defendant's remaining life expectancy was 41.6 years); *Calhoun,* 881 So. 2d at 311 (upholding 40 year sentence for armed robbery for first time offender whose remaining life expectancy was 42 years); *Goree,* 750 So. 2d at 1263 (upholding 40 year sentence for armed robbery, where defendant's remaining life expectancy was 41.6 years, with nothing in the record evidencing any physical impairment or illness).

---

[5] Indeed, the court stated that it could "find no authority in state or federal law requiring courts to use tables of life expectancy to determine the length of a sentence for determining whether a sentence is less than life." *McCline,* 2008 WL 4457842, at *7.

"The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer,* 538 U.S. at 77. This is simply not such a case. Petitioner's sentence was within the statutory limits, and he has failed to rebut the presumption of constitutionality by showing that his situation is exceptional. Accordingly, the Mississippi Supreme Court's decision upholding the trial court's sentence was neither contrary to, nor an unreasonable application of clearly established federal law. As such, Petitioner's claim for relief in Ground One should be denied.

Ground Five[6]

In Ground Five, Petitioner argues that the admission of his co-defendant Michael Barnes's statement was not harmless error, as the Mississippi Supreme Court concluded.

At trial, after beginning his testimony, Mr. Barnes refused to testify further concerning the robbery, even after ordered by the trial judge. Since Mr. Barnes would not testify, the State called as a witness Detective Rusty Keys, from the Hattiesburg Police Department, to read into evidence a statement Mr. Barnes had given regarding his activities on the

---

[6] This ground will be addressed out of order, before the court addresses Petitioner's ineffective assistance of counsel claims.

night of the robbery. The statement implicated Petitioner as the gunman during the robbery, and was signed by Mr. Barnes as well as the Detective. The statement was admitted over defense counsel's objection.[7] SCR vol. 2 at 77-80, 82-84, 87-104.

In *Bruton v. U.S.*, 391 U.S. 123, 126 (1968), the Court held that the admission of an accomplice's statement into the record at the trial of a criminal defendant violated the defendant's Sixth Amendment right where the accomplice did not testify, because defendant was denied an opportunity to cross-examine him. *Bruton,* 391 U.S. at 126. More recently, in *Crawford v. Washington,* 541 U.S. 36 (2004), the Court clarified that testimonial statements[8] are not admissible against a criminal defendant unless the witness is unavailable and defendant has had a prior opportunity to cross examine him.[9] *Crawford,* 541 U.S. at 68-69.

---

[7] However, before refusing to testify, Mr. Barnes testified that Petitioner was not with him on the night in question and that the only reason he implicated Petitioner in his statement was because he was under the impression that Petitioner had turned him in, so he was trying to "shoot back at him." *See* SCR vol. 2 at [sic]

[8] Although the court declined to provide a comprehensive definition of "testimonial," it held that at a minimum, it would include prior testimony at a preliminary hearing, before a grand jury and at a former trial, as well as to police interrogations. *Crawford,* 541 U.S. at 68.

[9] Before *Crawford,* testimonial out-of-court statements could be presented to the jury if the court deemed them reliable,

(Continued on following page)

"Confrontation clause errors . . . are subject to harmless-error analysis." *U.S. v. Fields,* 483 F. 3d 313, 378 (5th Cir. 2007) (citation omitted); *see also Kittelson v. Dretke,* 426 F.3d 306, 319 (5th Cir. 2005) ("before a court may grant relief on the basis of a violation of the Confrontation Clause, the court must apply harmless error analysis.") (citations omitted). The test for harmless error in a federal habeas action is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993); *see also Kittelson,* 426 F.3d at 319-20. Under *Brecht,* "a constitutional trial error is not so harmful as to entitle a defendant to habeas relief unless there is more than a mere reasonable possibility that it contributed to the verdict." *Nixon v. Epps,* 405 F.3d 318, 329-30 (5th Cir. 2005), *cert. denied,* 546 U.S. 1016 (2005).

The Mississippi Supreme Court found that the overwhelming evidence opposing Petitioner demonstrated that the trial court's error was harmless. This Court agrees. The volume of evidence against Petitioner is outlined *infra.* The State did not rely exclusively on the statement of Petitioner's co-defendant in its case against Petitioner. There was other evidence to support the prosecution's case – the store video, the witnesses' accounts of Petitioner's

---

as set forth in *Ohio v. Roberts,* 448 U.S. 56 (1980). *Lave v. Dretke,* 444 F.3d 333, 335 (5th Cir. 2006), *cert. denied,* 549 U.S. 1264 (2007).

admission,[10] and the other evidentiary testimony – and thus Mr. Barnes' statement was cumulative of the overwhelming and largely uncontroverted evidence before the jury. Upon review of the record, this Court cannot conclude that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Therefore, as the Mississippi Supreme Court's decision rejecting this claim was neither contrary to, nor an unreasonable application of clearly established federal law, Petitioner's claim for habeas relief under this Ground should be denied.

Ineffective Assistance of Counsel Claims – Grounds Two, Three, Four(b), Six and Seven

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the U.S. Supreme Court defined the standard by which an ineffective assistance of counsel claim in a habeas proceeding is to be measured: a petitioner must show that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." In order to establish deficiency, a petitioner

---

[10] Petitioner argues that Ms. Latosha Fairley's testimony regarding petitioner's confession was one of the most important factors upon which the Mississippi Supreme Court based its conclusion that the error was harmless, and that because the Court did not acknowledge or discuss her post-trial affidavit in which she raised doubts about the veracity of her trial testimony, the Court's harmless error analysis is called into question. The affidavit in question is discussed infra with respect to Grounds Six and Seven.

must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* This court's "scrutiny of counsel's performance must be highly deferential" and it must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also Moawad v. Anderson,* 143 F.3d 942, 946 (5th Cir. 1998) (observing that the Fifth Circuit "gives great deference to counsel's assistance, strongly presuming that counsel has exercised reasonable professional judgment") (internal quotations and citations omitted). In this regard, courts "must make every effort 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Motley v. Collins,* 18 F.3d 1223, 1226 (5th Cir. 1994) (*citing Strickland,* 466 U.S. at 689).

Under *Strickland,* a petitioner "may not simply allege but must 'affirmatively prove' prejudice." *Bonvillain v. Blackburn,* 780 F.2d 1248, 1253 (5th Cir. 1986) (citation omitted). In order to prove prejudice, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Motley,* 18 F.3d at 1223 (*citing Strickland,* 466 U.S. at 694). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* (*citing Strickland,* 466 U.S. at 694). Moreover, a petitioner must establish that "'the

result of the proceedings was fundamentally unfair or unreliable.'" *Vuong v. Scott,* 62 F.3d 673, 685 (5th Cir. 1995) (*quoting Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993)).

The right to effective assistance of counsel is not confined to trial, but extends to the first appeal as of right. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985). Claims of ineffective assistance of counsel on appeal are assessed under the same two-prong test established in *Strickland* for evaluating claims of ineffective assistance of counsel at trial. *U.S. v. Hamilton,* 2008 WL 2117679, at *3 (S.D. Miss., May 19, 2008) (*citing Williams v. Collins,* 16 F.3d 626, 635 (5th Cir. 1994)). The U.S. Supreme Court has recognized the value in appellate counsel examining the record and selecting the most promising issues for appellate review, and the Court has noted that experienced attorneys know the importance of focusing on their strongest arguments on appeal. *Jones v. Barnes,* 463 U.S. 745, 751-52 (1985). Thus, appellate counsel has no duty to raise every colorable claim on appeal. *Id.* at 754. Moreover, a petitioner must show that appellate counsel's failure to raise an issue on appeal prejudiced him – *i.e.,* that but for counsel's error, he would have prevailed on his appeal. *See Sharp v. Puckett,* 930 F.2d 450, 453 (5th Cir. 1991) (*citing Strickland,* 466 U.S. at 694).

As a final point,

> It bears repeating that the test for federal habeas purposes is *not* whether [the petitioner

> made the showing required under *Strickland*]. Instead, the test is whether the state court's decision – that [the petitioner] did *not* make the *Strickland* – showing – was contrary to, or an unreasonable application of, the standards provided by the clearly established federal law (*Strickland*), for succeeding on his [ineffective assistance of counsel] claim.

Busby v. Dretke, 359 F.3d 708, 717 (5th Cir. 2004), *cert. denied,* 541 U.S. 1087 (2004) (emphasis and brackets in original); *see also Neal v. Puckett,* 286 F.3d 230, 235-36 (5th Cir. 2002).

Ground Two

In Ground Two, Petitioner argues that he was denied effective assistance of counsel when his trial counsel failed to argue for transfer pursuant to Miss. Code Ann. § 43-21-159. This statute reads in relevant part:

> In any case where the defendant is a child as defined in this chapter and of which the circuit court has original jurisdiction, the circuit judge, upon a finding that it would be in the best interest of such child and in the interest of justice, may at any stage of the proceedings prior to the attachment of jeopardy transfer such proceedings to youth court for further proceedings . . .

Miss. Code Ann. § 43-21-159(4). Petitioner argues that his trial counsel's failure to request that his case

be transferred to Youth Court was sufficiently deficient and prejudicial as to constitute the ineffective assistance of counsel. Petition at 6-7.

This argument lacks merit, as petitioner's case was not eligible for transfer. Pursuant to Miss. Code Ann. § 43-21-159(7), "[n]o offense involving the use or possession of a firearm by a child who has reached his fifteenth birthday and which, if committed by an adult would be a felony, shall be transferred to youth court.". Petitioner was seventeen years old at the time of the commission of the crime of armed robbery, which is a felony, and this crime involved the use of a gun. *See* SCR vol. 2 at 3, 10-11, 19-20, 32-33, 38, 97, 113, 137; *see also Clark v. State,* 891 So. 2d 136, 137-38 (Miss. 2005), *cert. denied,* 544 U.S. 1025 (2005). Consequently, petitioner's trial was not eligible for transfer to Youth Court under Section 43-21-159(7). *See, e.g., Wash v. State,* 807 So. 2d 452 (Miss. Ct. App. 2001) (holding that transfer of armed robbery case involving use of firearm was not warranted under § 43-21-159(7) where defendant was fifteen at time of crime and, therefore, rejecting ineffective assistance of counsel claim); *Cockrell v. State,* 811 So. 2d 305 (Miss. Ct. App. 2001) (holding that prosecution for drive-by shooting committed by 16 year old could not be transferred to Youth Court).

Since Petitioner's trial could not have been transferred under the statute, counsel's failure to argue for such a transfer could not have been

deficient nor could it have prejudiced the defense.[11] Accordingly, the Mississippi Supreme Court's rejection of this claim did not involve an unreasonable application of *Strickland,* and habeas relief should be denied on this claim.

Ground Three

In Ground Three, Petitioner argues that he was denied effective assistance of counsel when trial counsel failed to argue that his fifty-four year sentence was disproportionately unconstitutional. Petitioner criticizes his trial counsel's failure to raise the unconstitutionality of the length of his sentence, as well as his co-defendant's relatively lenient sentence, either at sentencing or in Petitioner's Motion for a New Trial or Amendment to Motion for a New Trial.

As discussed *supra* with respect to Ground One, where a state sentence is within the statutory limits, the defendant must rebut the presumption of constitutionality by showing that his situation is exceptional. *See, e.g., Stewart v. Stalder,* 2007 WL 1890706,

---

[11] Moreover, the statute as quoted above states that a circuit judge *may* transfer qualified cases to the Youth Court, not that a circuit judge *must* do so. Thus, even if Petitioner's case had been eligible for transfer, there is no guarantee that a transfer would have been granted, as such transfers fall within the discretion of the presiding circuit judge. *See, e.g., Horne v. State,* 825 So. 2d 627, 635 (Miss. 2002) ("The power to transfer the case [to Youth Court] is clearly *permissive*, not *mandatory*.") (italics in original).

at *12 (E.D. La. June 28, 2007) (*citing Bonner v. Henderson,* 517 F.2d 135, 136 (5th Cir. 1975)). Petitioner was sentenced within the statutory limits, and he has failed to rebut the presumption of constitutionality by showing that his situation is exceptional. Moreover, although sentences are subject to challenge on Eighth Amendment grounds where they are "grossly disproportionate" to the crime committed, such challenges are successful only in "exceedingly rare" and "extreme" cases. *See, e.g., McCline v. Epps,* 2008 WL 4457842, at *6 (N.D. Miss. Sept. 30, 2008) (*citing Lockyer v. Andrade,* 538 U.S. 63, 73 (2003)). This is not one of those cases and, therefore, the court cannot say that it was unreasonable for Petitioner's counsel not to raise the sentencing issue on appeal. *See Jones v. Barnes,* 463 U.S. 745, 751-54 (1983) (holding that appellate counsel does not have a duty to raise every "colorable" claim on appeal, but rather, has broad discretion in determining which issues are more likely to be successful). Nor has Petitioner shown that but for counsel's error, he would have prevailed on his appeal. *See Sharp v. Puckett,* 930 F.2d 450, 453 (5th Cir. 1991). Accordingly, the court finds that the Mississippi Supreme Court's decision rejecting this claim did not involve an unreasonable application of *Strickland,* and therefore habeas relief should be denied.

Ground Four (b)

In Ground Four (b), Petitioner argues that he was denied the effective assistance of counsel when

his trial counsel failed to object to the District Attorney's comments at trial regarding Petitioner's post-*Miranda* silence. Petitioner argues that trial counsel's failure to object was a deficiency that prejudiced him at trial.

At issue is the District Attorney's comment regarding Petitioner's post-*Miranda* silence in the following testimony, taken from Petitioner's responses to the District Attorney's questions on cross examination:

Q: Did anybody at your house own any pistol?

A: Yes, sir.

Q: Who?

A: Jud Murray, Mandy's boyfriend.

Q: Okay. Where is he today?

A: I have no idea.

Q: Did you ever try to find him?

A: No, sir.

* * *

Q: Well, the reason I asked that is because – when is the first time you started saying – you told somebody that you were sick that night?

A: Sir?

Q: When was the first time that you told to anyone that you were sick that night, the night of December the 7th – I mean, September the 7th?

A: Here just recently since this trial?

Q: Okay. So you've come up with the sleep idea since the trial? Is that what your testimony is?

A: No, sir.

Q: When did you come up with the sleep idea?

A: There was no idea of me being asleep; it's a fact.

Q: Okay. Well, you invoked your Miranda rights and the Fifth Amendment of the United States Constitution and refused to talk, which is your right, and I respect that. But when was the first time you told someone – when was the first time you told your attorney that you were asleep?

A: I can't recall exactly. I've talked to my attorney off and on since this – since I've had this charge.

Q: Did you tell your attorney that you were asleep that night prior to yesterday?

A: Yes, sir.

(SCR, vol. 2 at 141-42).

Respondents argue that Petitioner's responses to his attorney on direct examination were ambiguous as to what he had previously told police. Specifically,

Respondents point to the following exchange that took place between Petitioner and his attorney on direct examination:

Q: Where had you been before that? [before, according to Petitioner, Michael Barnes showed up at the house]

A: In the bed.

Q: Why is that?

A: I had previously been sick, and I'd been down in the bed for a few days.

* * *

Q: So did you subsequently talk to the police about this?

A: Sir?

Q: After that time, did you talk to the police about this?

A: I didn't talk – I didn't talk to them about it.

Q: Did the police come to talk to you about it?

A: Yes, sir. They came and arrested me and released me the same night.

Q: What did you tell them?

A: That I wanted to speak with an attorney.

Q: At that time did you know anything, any specifics about this robbery?

A: No, sir.

Q: And didn't you tell them that?

A: Yes, sir.

SCR vol. 2 at 138-39.

Given that at least one of Petitioner's responses could be interpreted as indicating that Petitioner was suggesting through his testimony that he had previously told his exculpatory story to police, Respondents claim the District Attorney was merely trying to determine when Petitioner first claimed that he had been asleep during the robbery. Petitioner argues that the District Attorney's intent was to comment on Petitioner's post-*Miranda* silence, and that his question was a mere excuse to mention Petitioner's silence in front of the jury.

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the U.S. Supreme Court held that the Due Process Clause prohibits the government from using a defendant's post-arrest, post-*Miranda* silence to create an inference of guilt. While, under *Doyle*, the use for impeachment purposes of the petitioner's silence at the time of arrest and after receiving Miranda warnings violates the Fourteenth Amendment, *Doyle* does not apply to cross examination inquiries into prior inconsistent statements. *McCoy v. King*, 2007 WL 2461941, at *5 (S.D. Miss. July 23, 2007) (*citing Anderson v. Charles*, 447 U.S. 404 (1980)). Thus, the State may use a defendant's post-arrest silence to challenge trial testimony given by the defendant that

is inconsistent with statements allegedly made after receiving *Miranda* warnings. *Id.*

The Fifth Circuit has stated that although virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation, a prosecutor's comments must be evaluated in context. *U.S. v. Rodriguez,* 43 F.3d 117, 121 (5th Cir. 1995) (*citing U.S. v. Laury,* 985 F.2d 1293, 1303 (5th Cir. 1993)). To determine whether comments or testimony violate *Doyle,* we must ask "whether the 'manifest intent' of the remarks was to comment on the defendant's silence, or (stated another way) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *U.S. v. Pennington,* 20 F.3d 593, 599 (5th Cir. 1994) (citation omitted).

In the instant case, this Court agrees with Respondents that the District Attorney's question arose out of an attempt to clarify what Petitioner had previously said to police regarding his whereabouts on the night of the robbery. The District Attorney asked Petitioner about whether he had previously discussed his being asleep at the time of the robbery with his attorney. The manifest intent evidenced by the District Attorney's line of questioning was not to mask a calculated mention of Petitioner's post-*Miranda* silence. In inquiring into the possibility that Petitioner had made prior inconsistent statements to police and in his testimony, the District Attorney

did not violate Petitioner's rights under *Doyle*. *See Anderson*, 447 U.S. at 404.

However, even if the District Attorney's comment were deemed to constitute a *Doyle* violation, Petitioner would not be entitled to habeas relief on this ground. *Doyle* violations are reviewed under the doctrine of harmless error, by determining whether the error was harmless beyond a reasonable doubt. *U.S. v. Garcia-Flores*, 246 F.3d 451, 455 (5th Cir. 2001) (citation omitted). Having reviewed the record, the court finds that, even assuming *arguendo* that there was a *Doyle* violation, the violation of Petitioner's rights was harmless. Petitioner was implicated by a statement by his co-defendant, he matched the physical description given by the store clerk, and he matched one of the subjects seen on the video tape admitted into evidence. SCR, vol. 2 at 19, 58-59, 96-97, 109-114. Both Latosha Fairley, Petitioner's girlfriend, and Mandy Weathers, Petitioner's roommate at the time of the robbery, testified that Petitioner admitted to them that he had committed the robbery. SCR, vol. 2 at 38, 58-59. Ms. Weathers, Petitioner's roommate, testified that Petitioner had given her a gun similar to the one used in the robbery and that he borrowed the gun from her prior to the robbery. SCR, vol. 2 at 38.

Although Petitioner's post-*Miranda* silence was referenced in the context of a discussion regarding Petitioner's exculpatory story, Petitioner's post-*Miranda* silence was mentioned only once at trial, the prosecution did not refer to Petitioner's post-*Miranda*

silence in its closing argument, and the evidence at trial of Petitioner's guilt was overwhelming. *See U.S. v. Garcia,* 144 Fed. Appx. 379, 380 (5th Cir. July 19, 2005) (*per curiam*); *see also Garcia-Flores,* 246 F.3d at 456 ("When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.") (citation omitted).

As the District Attorney's mention of Petitioner's post-Miranda silence was harmless error, the failure of Petitioner's trial counsel to object can not be deemed prejudicial to the defense under *Strickland.* Accordingly, the Mississippi Supreme Court's rejection of this claim did not involve an unreasonable application of *Strickland,* and this ground does not provide a basis for habeas relief.

Ground Seven[12]

In Ground Seven, Petitioner claims that he was denied the effective assistance of counsel when his trial counsel failed to subpoena and recall Latosha Fairley at trial.

---

[12] This ground will be addressed out of order, as the court's resolution of it has bearing on Ground Six, which will be discussed next.

The record reflects that after Ms. Fairley testified about an admission of guilt Petitioner had made to her (SCR vol. 2 at 58), and after she had been finally excused from her subpoena, Ms. Fairley contacted Petitioner's counsel and expressed concerns about the reliability of her testimony. Specifically, Petitioner's trial counsel conveyed to the court that Ms. Fairley told him that after thinking about her testimony, she "realized that she could not say that [Petitioner had confessed to her] for sure . . . that she had heard so much talk about it, that that was just in her head." Trial counsel told Ms. Fairley that she was not under subpoena, and that it was very important for her to return to court to testify. SCR vol. 3 at 153. However, Ms. Fairley did not return to court. Trial counsel made attempts to locate her, but apparently was unable to do so. After speaking with her about her testimony, trial counsel informed the court that she would be returning to provide additional testimony, but Ms. Fairley never re-appeared. The defense then rested. SCR vol. 2 at 153-55. Trial counsel subsequently secured an affidavit from Ms. Fairley, dated July 19, 2002 (two days after the trial) and attached it to his Motion for Judgment Notwithstanding the Verdict or Alternatively for a New Trial.[13]

---

[13] Ms. Fairley's affidavit states in pertinent part: "Since I gave that testimony, I have searched my mind, memory heart and I realize that I cannot say for certain. I know that I wanted to ask him that question and I know that he and I talked about the incident, but in trying to be as honest as I can, I cannot remember him ever saying he did it. I know that I was under so

(Continued on following page)

Petitioner argues that trial counsel's failure to subpoena and recall Ms. Fairley constituted ineffective assistance of counsel. *Strickland* requires Petitioner to show both a deficiency in trial counsel's representation and prejudice. *See Strickland,* 466 U.S. at 687. Petitioner has shown neither. In dealing with a witness who was expressing doubts about her own testimony, trial counsel appears to have exercised his strategic discretion in first attempting to recall Ms. Fairley and, later, in securing her affidavit. Petitioner has fallen far short of proving that his trial counsel was deficient in failing to subpoena a witness who refused to reappear voluntarily, and who had previously testified against Petitioner.

Even with the presence of Ms. Fairley's affidavit in the record, Petitioner cannot prove or has not otherwise demonstrated what she would have testified if subpoenaed to reappear at Petitioner's trial.

---

much pressure from the police and heard from so many other people that pointed the finger at Cliff, that I am afraid that my mind and memory have been influenced by that rather than what I know from own knowledge. I am giving this statement only because I want to be totally truthful in this case. It has not been my intention to give false testimony. When I was on the stand, I was so scared and intimidated by the whole system that I wasn't sure what I was saying. When we were in the witness room, Mandy Weathers told me that she was going to say whatever was necessary to keep herself out fo [sic] trouble. I don't know if I was influenced by that or something else. All I know for sure is that after thinking about this, I felt I could not live with myself without coming forward." SCR vol. 1 at 39-40.

Considering the discrepancy between her trial testimony and the substance of her affidavit, this Court, like Petitioner, can only speculate on what Ms. Fairley would have testified if subpoenaed for a second appearance at his trial. Ms. Fairley's affidavit indicates that she was having doubts about her memory, but it does not state that she could have testified as to the truth of any of Petitioner's defenses or the reliability of any of the State's other witnesses.[14] She was not the only witness to testify that Petitioner admitted his guilt in the robbery after the robbery occurred. Mandy Weathers testified that she had heard the same statement (SCR vol. 2 at 38-39), and her testimony supports (despite Ms. Fairley's subsequently alleged misgivings) the reliability of Ms. Fairley's testimony. *See Dorsey v. Wilson*, 2008 WL 2952892, at *11 (W.D. Pa. July 30, 2008) (noting that affidavit of witness recanting prior trial testimony [sic] not reliable evidence of habeas petitioner's actual innocence, as it "merely supports the fact that Petitioner did not *admit* to his presence in the car from which the shots were fired, it does nothing to

---

[14] Nor does Ms. Fairley state that she would have disavowed her identification of Petitioner from the store's surveillance video. Ms. Fairley testified that Detective Keys showed her the video several times, that the tall figure with the gun "resembled him [Petitioner] a lot" in terms of his "build" and his "actions," and that although she could not "say for a fact it was him," she believed it was. Ms. Fairley testified that her suspicions were confirmed after she spoke with Petitioner on the phone, asked him if he had robbed the store, and he said that he had. SCR vol. 2 at 58-59.

disestablish the other evidence of Petitioner's guilt.") (emphasis in original).

Moreover, "it has long been established that recanting testimony must be viewed with extreme skepticism." *Thomas v. Cain*, 2006 WL 2990083, at *9 (W.D. La. Sept. 18, 2006) (*citing Graves v. Cockrell*, 351 F.3d 143, 153 (5th Cir. 2003)); *see also Hernandez v. Semkowski*, 1996 WL 285426, at *1 (E.D.N.Y. May 17, 1996) ("it is generally understood that recantations are unreliable and lack trustworthiness.").

In light of the foregoing, Petitioner cannot establish that the absence of Ms. Fairley's testimony, even if it would have been favorable to him, prejudiced his defense. Petitioner's claim of ineffective assistance of counsel in connection with trial counsel's decisions regarding the testimony of Ms. Fairley fails to satisfy the two-part *Strickland* test. Accordingly, the Mississippi Supreme Court's rejection of this claim did not involve an unreasonable application of *Strickland*, and habeas relief should be denied on this claim.

Ground Six

In Ground Six, Petitioner argues that he was denied effective assistance of counsel on direct appeal, based on his counsel's failure to raise two specific issues on appeal: the post-trial affidavit of Ms. Fairley and the admission of Petitioner's co-defendant Barnes's statement into the trial record.

The evidence at issue in Petitioner's claim – the testimony and post-trial affidavit of Latosha Fairley, and the statement of Co-Defendant Barnes – represented only two portions of the evidence against Petitioner. Appellate counsel's failure to raise Petitioner's issues regarding this evidence was clearly within his discretion, as acknowledged by the Supreme Court in *Jones v. Barnes*. As appellate counsel has no duty to raise every colorable claim on appeal, the failure of Petitioner's appellate counsel to raise specific issues he identified after his appeal was denied does not amount to a deficiency that would constitute ineffective assistance under *Strickland*. Nor has Petitioner established that appellate counsel's failure to raise these issues prejudiced him, and that but for these alleged errors, the outcome of his appeal would have been different. This is especially the case when, as discussed *supra*, neither of these two claims would likely have been successful. Accordingly, the Mississippi Supreme Court's rejection of this claim did not involve an unreasonable application of *Strickland*, and habeas relief should be denied under Ground Six.

RECOMMENDATION

For the reasons stated above, it is the recommendation of this Court that the relief sought in Clifton Clark's Petition for Writ of Habeas Corpus [1] be denied, and that the Petition be dismissed with prejudice.

NOTICE OF RIGHT TO APPEAL/OBJECT

In accordance with the rules and 28 U.S.C. § 636(b)(1), any party within ten days after being served a copy of this recommendation, may serve and file written objections to the recommendations, with a copy to the judge, the magistrate judge and the opposing party. The District Judge at the time may accept, reject or modify in whole or part, the recommendations of the Magistrate Judge, or may receive further evidence or recommit the matter to this Court with instructions. The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendations contained within this report and recommendation within ten days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions accepted by the district court to which the party has not objected. *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

TIIIS, the 6th day of February, 2009.

s/ Michael T. Parker
United States Magistrate Judge